Supreme Court, U.S.
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No. 99-2078

IN THE

Supreme Court of the United States

ARNOLD PAUL PROSPERI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Eleventh Circuit departed from the decisions of other courts of appeals with respect to three important and recurring questions of federal criminal procedure. Far from remotely suggesting that review of those three questions is unwarranted in this case, the unseemly contortions in which the Government's lengthy brief in opposition ("Opp.") must engage in an attempt to avoid review only highlight the urgent need for this Court's guidance.

I. The Decision Below Exacerbates A Conflict Regarding The Scope Of Fed. R. Evid. 606(b).

Relying exclusively on Fed. R. Evid. 606(b), which prohibits jurors from testifying about their deliberative processes "[u]pon inquiry into the validity of a verdict," the courts below refused to investigate allegations of juror misconduct that came to light *before* the jury rendered a verdict. As demonstrated in the petition (Pet. 12-14), several circuits disagree with that interpretation of Rule 606(b), and hold instead that that rule does not control the court's conduct when allegations of misconduct are brought to the court's attention pre-verdict. The Government's principal response is to deny that the courts below relied on Rule 606(b) in refusing to investigate petitioner's claims. While not lacking in audacity, the Government's arguments are completely preposterous.

1. The Government first contends that the scope of Rule 606(b) "is not properly presented by this case" (Opp. 9) because the Eleventh Circuit merely recognized that the district court had "discretion" to decline to investigate claims of juror misconduct and found "no abuse of discretion on these facts." Opp. 11. That argument rests upon a wholesale mischaracterization of the decisions below.

The district court *repeatedly* invoked Rule 606(b) as a bar to any investigation or inquiry into the many allegations of serious misconduct that were brought to its attention. Pet. App. 53a ("[T]he only way you get that [hearing] is with

illegal testimony under Rule 606(b)"); *id.* at 67a ("The only thing you can even take a statement on is whether there is an outside influence"); *Ibid.* ("The only thing that I can really consider under Rule 606(b) is an outside influence and . . . this doesn't involve outside influences"). Thus, the district court did not merely "reference[]" Rule 606(b), Opp. 4; it predicated its refusal to investigate the claims of juror misconduct entirely upon it.

Like the district court, the court of appeals plainly believed—and *repeatedly* stated—that whatever discretion the district court enjoyed to investigate the claims of juror misconduct was "*discretion under Rule 606(b).*" Pet. App. 7a (emphasis added). After quoting Rule 606(b) *in full* (Pet. App. 6a & n.4), the court began its analysis by reaffirming "the breadth of the district court's discretion *under Rule 606(b)*," Pet. App. 6a (emphasis added), and invoked the distinction between "internal" and "external" influences—a distinction that flows from this Court's Rule 606(b) jurisprudence—as the basis for assessing whether the district court's refusal to conduct an investigation was proper. Indeed, the court expressly relied on *United States v. Norton*, 867 F.2d 1354 (11th Cir. 1989), which upheld a district court's refusal to conduct an investigation into allegations of juror duress brought to light *before* a verdict on the ground that under "*Fed. R. Evid. 606(b)* . . . [t]he alleged harassment or intimidation of one juror by another [is] not . . . competent evidence to impeach [a] guilty verdict." *Id.* at 1366 (emphasis added).

The court of appeals thus began and ended its analysis of the juror misconduct claim with the *explicit* understanding that Rule 606(b) establishes the framework under which such claims must be analyzed. Under *no* plausible reading of the opinion can the Eleventh Circuit be said to have held that the district court properly declined to investigate the allegations of juror misconduct in the exercise of some general "discretion" that is somehow independent of that Rule. Because the court of appeals affirmatively *endorsed* the

district court's conclusion that it lacked authority to conduct an investigation under Rule 606(b), the scope of that Rule is properly presented by the petition.

2. The Government next contends that review is unwarranted because "the court of appeals' reliance on the distinction between intrinsic and extrinsic influences was proper whether or not Rule 606(b) applies." Opp. 13. Whatever the merits of that argument, it is irrelevant to whether the petition should be granted. The question presented by the petition is *not* whether "district courts have correspondingly greater discretion to decline to conduct an investigation of intrinsic influences than they do with respect to extrinsic influences." Opp. 11-12. At issue here is whether the court of appeals correctly concluded that the district court had *no* discretion to investigate pre-verdict allegations of juror misconduct "*under Rule 606(b)*." Pet. 17a (emphasis added).

Indeed, even if the Government were correct that pre-verdict claims of juror misconduct are governed by a rule of "discretion," reversal would be required, because *no* court has exercised its "discretion" in this case. Both the district court and Eleventh Circuit believed that *no* investigation *could* be conducted given that Rule 606(b) bars testimony on matters "entirely endemic to the deliberations." Pet. App. 7a. Accordingly, whatever "discretion" the Government now believes the district court *might* have had to decline to investigate the juror misconduct was not exercised (one way *or* the other), because the district court believed that under Rule 606(b) it had no authority to investigate at all.

Where, as here, both the district court and court of appeals analyzed the scope of the district court's power on the basis of an erroneous legal premise, this Court's cases preclude the Government's argument that "discretion" was properly exercised in any event. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (a court "by definition abuses its discretion when it makes an error of law"); *Cooter & Gell v. Hartmarx Corp.*,

496 U.S. 384, 405 (1990) (same).[1] The Government's failure even to cite, much less adequately distinguish, *Koon* and *Cooter & Gell*—both of which are fatal to the Government's theory of "discretion"—is telling.

3. Finally, the Government contends that review is unwarranted because no circuit conflict exists regarding Rule 606(b)'s applicability to claims of juror misconduct that come to light before a verdict has been returned. That argument is predicated not only on the Government's wholly indefensible reading of the decisions below—which treats those decisions as though they never so much as mentioned Rule 606(b)—but also on equally contrived interpretations of the decisions of other circuits that agree with the Eleventh Circuit's erroneous interpretation of Rule 606(b).

As a threshold matter, not even the Government disputes that the Third, Fifth, and Seventh Circuits have recognized

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[1] It is far from clear, in any event, that at the merits stage the Government could successfully defend the proposition that district courts have *more* discretion to refuse to investigate claims of internal misconduct brought to light before a verdict than they do to investigate extrinsic ones. When enacting Rule 606(b), Congress encouraged jurors "to be conscientious in promptly reporting to the court misconduct that occurs during deliberations," because it recognized that post-verdict testimony on such matters would be barred by the Rule. *See* Advisory Committee's Notes to Subdivision (b), FED. R. EVID. 606(B). For the same reason, this Court in *Tanner v. United States*, 483 U.S. 107 (1987), invited jurors to "report inappropriate juror behavior to the court *before* they render a verdict." *Id.* at 127 (emphasis in original). Several courts have recognized the need for prompt reporting and investigation of pre-verdict intrinsic misconduct because post-verdict reports come "too late." *See United States v. Stafford*, 136 F.3d 1109, 1113 (7th Cir. 1998). Because Rule 606(b) effectively places the effect of improper internal influences beyond judicial review once a verdict is returned, a district court bears a special duty to investigate such allegations as soon as they are reported.

that Rule 606(b) is inoperative when claims of juror misconduct are brought to light before a verdict is returned. The Government submits, however, that neither the Sixth nor the Tenth Circuit has held that Rule 606(b) applies to pre-verdict claims of juror misconduct. Even if the Government were correct in its reading of the Sixth and Tenth Circuit authorities, certiorari would nonetheless be warranted to address the conflict created by the Eleventh Circuit in this case. In any event, the Government's reading of the cases from the Sixth and Tenth Circuits owes more to wishful thinking than to any cogent legal analysis.

According to the Government, *United States v. Herndon*, 156 F.3d 629 (6th Cir. 1998), "did not hold that Rule 606(b) bars pre-verdict inquiries into instances of internal misconduct." Opp. 13. That, however, is an entirely insupportable interpretation of *Herndon*. At issue in *Herndon* was whether the district court properly declined to investigate claims of juror misconduct brought to light during deliberations. The Sixth Circuit explained that to resolve that issue "we *must* . . . determine whether the influence on [the] juror . . . was internal or extraneous"—and cited to and quoted Rule 606(b) in full. 156 F.3d at 634. The *entirety* of the Sixth Circuit's discussion of "internal" and "external" influences was—as the Government must surely recognize—directed to determining whether the juror misconduct at issue ran afoul of that quoted rule. Like the Eleventh Circuit in this case, the Sixth Circuit quoted from, and relied on, Rule 606(b) because the court believed that Rule controlled the court's analysis, not because it was an interesting aside.

Similarly unavailing is the Government's attempt to recharacterize the Tenth Circuit's settled rule that Rule 606(b) applies to allegations of internal misconduct raised during deliberations. *See United States v. Davis*, 1 F.3d 1014 (10th Cir. 1993). The Government suggests that *Davis* merely "mention[s]" Rule 606(b), and contends that "the [*Davis*] court did not say . . . that Rule 606(b) applies to inquiries conducted before [a] verdict." Opp. 14. That,

however, is precisely what *Davis does* say. *See Davis*, 1 F.3d at 1016 ("[i]nquiry into such matters, *within the limitations of Rule 606(b)* . . . is the appropriate method of developing such allegations") (emphasis added). The Government either has not read *Davis* or has understood it exactly backward.[2]

II. The Courts Of Appeals Are Divided Regarding The Permissibility Of The Supplemental Jury Charge.

1. The Government's attempt to deny the existence of a circuit conflict on the *Allen*-charge question is no more convincing than its argument that no conflict exists with respect to the scope of Rule 606(b). The Government contends that cautionary language reminding jurors of their right to adhere to their sincerely-held beliefs is a necessary component of a supplemental charge *only* when the supplemental charge contains features that render the charge "otherwise . . . coercive." Opp. 19. The Government submits that no circuit conflict exists regarding the propriety of the jury charge given in *this* case because (1) the district court instructed the jurors to adhere to their sincerely-held beliefs in its *initial* charge to the jury; and (2) no additional coercive elements were present. According to the Government, the several cases cited as conflicting authorities in the petition "are all distinguishable" for those reasons. *Ibid.*

The Government's argument is wholly unpersuasive. The Government cites to no case, nor is petitioner aware of any, that holds that the curative component of an *Allen*-charge is unnecessary where the trial court instructed jurors to adhere to their sincerely-held views before the jury retired to deliberate. To the contrary, the courts of appeals have

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[2] The Government also goes to great lengths to suggest that prior to the decision below the Eleventh Circuit "recognize[d] that trial courts *do* have discretion to interview jurors about intrinsic influences . . . notwithstanding Rule 606(b)." Opp. 10. That claim—even if correct—is entirely irrelevant, given the direct conflict posed by the decision in *this* case with the decision of several other circuits.

recognized, as has this Court, that cautionary language is essential precisely because the *Allen*-charge is a response to jury *deadlock*, which by definition implicates constitutional considerations that are not present when the first charge to the jury is delivered. *See Burton v. United States*, 196 U.S. 283, 307 (1905). Moreover, the Government's position makes little logical sense, because it essentially would place beyond judicial review *any* supplemental anti-deadlock charge, no matter how coercive, provided the trial court in its original instructions properly advised jurors, as courts presumably do in *all* cases, to adhere to their sincerely-held convictions.

Equally unavailing is the Government's effort to invent additional "coercive" features in the supplemental charges at issue in each of the cases cited by the petition that require cautionary language to be included in an *Allen*-charge. The Government's discussion of *Smalls v. Batista*, 191 F.3d 272 (2d Cir. 1999), is emblematic of this approach. The supplemental charge in *Smalls* is virtually identical to the supplemental charge given by the district court here. *See* 191 F.3d at 274-75 (quoting trial court's instruction to "go back and again discuss this amongst yourselves" and "continue a free discussion"). As does the Government here, the prosecutor in *Smalls* defended the instruction on the ground that it "never urged the jury to reach a verdict, but rather ordered them only to continue to deliberate, argue and discuss." *Id.* at 279. Nonetheless, the Second Circuit, sitting in habeas, reversed the defendant's conviction, holding that "*any Allen*-type charge" *must* contain "cautionary language which would discourage jurors from surrendering their own conscientiously held beliefs." *Ibid.* (emphasis added). *Smalls* expressly stated that the lack of cautionary language in the supplemental charge was its "fatal flaw." *Ibid.*

The Government breezes over these passages and reads *Smalls* as having been based on several other facts, including that "the jury knew that the judge was aware of the nature of the division." Opp. 19. But the Government's view is belied

by the express holding of the court: "It is this lack of cautionary language . . . that renders the charge coercive and a violation of Smalls' constitutional rights to due process and a fair trial." 191 F.3d at 280. Although the Second Circuit *did* recognize that other features of the charge may have contributed to its coercive power—including the fact that the court was aware of the jury's numerical division—it took pains to point out that "the charge was rendered coercive not so much for what it contained but for what it *failed* to contain . . .[,] the absence of cautionary language." *Ibid.* (emphasis added). The Government's attempt to distinguish *Smalls* is meritless; *Smalls* squarely conflicts with the decision of the Eleventh Circuit below.[3]

The Government's rendition of cases from other circuits is equally inapt. The Government does not so much as cite the First Circuit's decision in *United States v. Hernandez-Albino*, which ruled—contrary to the paradigm invented by the Government for its brief in this case—that "*[a]ny* supplemental instruction which urges the jury to return to its deliberations *must* include" language conveying to the jury that it has "the right not to agree." 177 F.3d 33, 38 (1st Cir.

[3] The Government contends that this case is unlike *Smalls* because the judge was unaware of the jury's nascent verdict and the jury had no reason to suspect the judge was aware of its numerical division. Opp. 17 n.7. That is simply not correct. Juror Huffman, the dismissed alternate, informed the district court that the jury was divided 10-2. Pet. App. 50a. Moreover, juror Budd—who petitioner contends compromised her verdict after the court's supplemental charge—undoubtedly knew that the district court was aware of the jury's nascent verdict because the day after she disclosed that information to the dismissed alternate the district court strongly admonished the jury to speak "with no one outside the jury." *Ibid.* If the charge in *Smalls* was coercive because the jury was "aware[] of [the district court's knowledge]" of the jury's nascent verdict, the charge given here must be said to have been coercive on that basis as well. Opp. 17 n.7. As noted in the text, however, the Second Circuit did not rely upon that fact in reversing Smalls' conviction.

1999) (emphases in original). The Government's characterization of cases cited by petitioner from the Fourth, Sixth, and Ninth Circuits—all of which also require cautionary language to be given in *any Allen*-type charge—is misleading. Opp. 21 (reviewing *United States v. Mason*, 658 F.2d 1263 (9th Cir. 1981); *United States v. Scott*, 547 F.2d 334 (6th Cir. 1977); *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961)). None of those decisions is based on any of the "coercive" features the Government now asserts to have been essential to each. Instead, those cases endorse the proposition that cautionary language is required virtually *every time* a trial court instructs a deadlocked jury to "continue deliberating," because the message conveyed to the jury in such circumstances is inherently coercive—*i.e.*, that deadlock is unacceptable, and that a verdict *must* be produced.[4]

In short, the Eleventh Circuit's decision squarely conflicts with *Smalls* and with the decisions of the First, Fourth, Sixth, and Ninth Circuits, and comports with the prevailing rule in the Fifth and Seventh Circuits. Review by this Court is necessary to restore uniformity to this important area of federal criminal procedure.

III. The Decision Below Departs From The Established Interpretation Of Counterfeiting Statutes.

The Government's opposition entirely fails to address, much less refute, the central claims in support of review of

[4] *See Mason*, 658 F.2d at 1268 ("It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party"); *Scott*, 547 F.2d at 337 ("[t]he reminder that no juror should merely acquiesce in the majority opinion is therefore one of the most important parts of the *Allen* charge"); *Rogers*, 289 F.2d at 437 ("When the moderating condition which makes [the supplemental charge] permissible . . . is omitted, then the direction becomes so likely to be coercive, that a verdict rendered promptly thereafter should not be allowed to stand").

the court of appeals' construction of section 513: its departure from the rule concededly followed by "virtually every court of appeals" (Pet. App. 10a) that counterfeiting statutes require a finding of "similitude"—a rule that is required by the courts' duty to construe federal statutes in accordance with common law principles (Pet. 27)—and its substantial interference with Congress' carefully-crafted enforcement scheme by rendering another statute (18 U.S.C. § 514) essentially superfluous.

The essence of the Government's position—wisely consigned to a footnote—boils down to the proposition that petitioner is improperly attempting to rely on legislative history that accompanied Section 514 that merely reflects "the views of [a] single Senator." Opp. 24-25 n.10. That is not so. Aside from emphasizing the *conceded* departure from the established interpretation of counterfeiting statutes (Pet. App. 10a), petitioner relies on *a subsequently enacted statute* that explicitly addresses the conduct in which petitioner is said to have engaged, and which obviously is far more significant to statutory interpretation than the "views of a subsequent Congress." Opp. 25 n.10. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 9 (1967).

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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